Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
New Skies	)	File Nos. See Attachment A
Satellites, N.V.	)	
	)	
For Authorization	)	
to Access the U.S. Market	)	
	)	
	)	

ORDER AND AUTHORIZATION

Adopted: August 6, 1999 Released: August 6, 1999

By the Commission:

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I. INTRODUCTION

1. By this Order, we authorize certain U.S. earth stations to provide fixed-satellite services (FSS) to, from, and within the United States via New Skies Satellites, N.V. (New Skies).[1] New Skies is the spin-off of the International Telecommunications Satellite Organization (INTELSAT).[2] First, we grant over one hundred modification applications filed by U.S. earth station licensees to access various New Skies satellites. This grant will ensure continuity of service to those operators using the New Skies satellites prior to the transfer from INTELSAT. Second, we grant pending applications by U.S. earth station entities to provide domestic and international FSS services in the United States via the New Skies satellites for the first time.[3]

2. The United States supported the decision of the 1998 INTELSAT Assembly of Parties to take the first step toward privatization by creating New Skies. We welcome the opportunity to authorize, for the first time, provision of satellite service in the United States using satellites licensed by the Netherlands, a member of the World Trade Organization (WTO). Moreover, we believe that authorizing entry will provide a basis for New Skies to move forward with a substantial initial public offering (IPO). In applying the standard we established in the *DISCO II Order* for affiliates of intergovernmental satellite organizations (IGOs), we find that New Skies's entry into the U.S. market will not pose a very high risk to competition that cannot be

[1] Attachment A. FSS is defined as a satellite radiocommunications service between earth stations at fixed positions. 47 C.F.R. § 25.201.

[2] INTELSAT is an intergovernmental satellite organization (IGO) that transferred five satellites to New Skies: New Skies 513 at 183° E.L., New Skies 703 at 57° E.L., New Skies 803 at 338.5° E.L., New Skies 806 at 319.5° E.L., and New Skies K at 338.5° E.L. INTELSAT also transferred a sixth satellite, the K-TV satellite, which has not yet been launched. *Procedures for Earth Station Licensees Using INTELSAT Satellites That Will Transfer to New Skies Satellite, N.V.*, Public Notice, Report No. DS-1851, June 12, 1998 ("June 1998 Public Notice").

[3] In the World Trade Organization Agreement on Basic Telecommunications Services (WTO Basic Telecom Agreement), the U.S. committed to allow service providers from WTO member countries to provide a broad range of basic of telecommunications services, including satellite services, in the United States. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 2 (GATT Secretariat 1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. The *DISCO II Order* recognized that in the WTO Basic Telecom Agreement, the United States did not make market access commitments for Direct-to-Home Services (DTH), Direct-Broadcasting Services (DBS), and Digital Audio Radio Services (DARS) and adopted the effective competitive opportunities (ECO-Sat) test for requests involving provision of DTH, DBS, and DARS by non-U.S. licensed satellites.

cured by conditions, and thus does not warrant a denial of the applications. We find, however, that New Skies has yet to complete the full transition to a company independent of INTELSAT, as contemplated by the INTELSAT Assembly of Parties in creating New Skies. Until New Skies completes this transition, there remains a potential for harm to competition in the U.S. market, and the competitive benefits that would result from a new, independent competitor will not be fully realized. We, therefore, limit the term of the earth station licenses granted here to three years.[4] The three-year license term is intended to encourage New Skies to become independent of INTELSAT in a timely manner, consistent with the Assembly Decision.[5] As discussed below, at any time during the three-year license term, the Commission may consider appropriate action to extend the earth station licenses for a full ten-year term upon a showing by New Skies that it is independent of INTELSAT.[6] In the interim, we will impose a requirement that New Skies file quarterly with the Commission a status report on its plans for an initial public offering and other steps it has taken towards independence.

II. BACKGROUND

3. INTELSAT is an IGO created to own and operate the first commercial global satellite system. Currently, INTELSAT has 143 member governments, a global system of 19 geostationary satellites, and over $900 million in annual operating revenues.[7] INTELSAT provides wholesale satellite capacity ("space segment") to its Signatories that invest in its system and to other "direct-access" users.[8] INTELSAT's capacity is predominately used for FSS services such as transmission of voice, data, and video programming from a fixed location in one country to a fixed location in another.[9] INTELSAT's Signatories and, in some countries, providers with direct access to INTELSAT space segment capacity provide communications services to individual homes and businesses on a retail basis as well.[10] Although INTELSAT

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[4] The Commission may modify any station license if in the Commission's judgment such action will promote the public interest, convenience, and necessity. 47 U.S.C. § 316.

[5] INTELSAT Assembly of Parties, *Record of Decisions of the Twenty-Second (Extraordinary) Meeting*, (AP-22-3E Provisional) Salvador, Brazil, March 31, 1998 ("Assembly Decision").

[6] Any extension of the earth stations' license term would be from the date of the end of the current three-year license.

[7] INTELSAT Web Page, *About INTELSAT*, <http://www.INTELSAT.com/about/intelsat.htm> (visited April 1, 1999) ("INTELSAT Web Page").

[8] *Id.* INTELSAT's owners contribute capital in proportion to their relative use of the system and receive a return on their investment. Any nation may use the INTELSAT system, whether or not it is a member.

[9] INTELSAT Annual Report, 1997 at 4.

[10] INTELSAT Web Page.

originally provided basic telephone connectivity and television feeds, it has added new services over time, particularly multi-point and high-speed data communications.

A. Creation of New Skies

4. In 1998, INTELSAT created New Skies as a separate, private satellite company. International negotiations among the members of INTELSAT culminated with a March 1998 INTELSAT Assembly of Parties Decision that spun New Skies off from INTELSAT as a separate but affiliated company.[11]

5. The United States provisionally associated with the Assembly Decision, and acknowledged that numerous uncertainties regarding the restructuring of New Skies remained and that resolution of these uncertainties will ultimately determine whether the creation of New Skies advances or frustrates competition in the satellite services market. The United States stated:

> We fully expect the outcome to be pro-competitive. But, if it is not, each Party will have the prerogative, and indeed the obligation, to take whatever corrective measures it deems appropriate to protect against or prevent the distortive effects of a non-competitive outcome.[12]

6. The United States further stated that the FCC would need to issue authorizations for earth stations to operate with New Skies's satellites, and that the FCC would base its review of the applications on statutory public interest requirements, competition policy factors, and Commission rules implementing the WTO Basic Telecom Agreement.[13]

7. New Skies was incorporated in the Royal Kingdom of the Netherlands (The Netherlands) on April 23, 1998.[14] New Skies became operational November 30, 1998, after INTELSAT transferred to New Skies various assets including five operational satellites.[15]

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[11] Assembly Decision at 5.

[12] Statement of the Party of the United States ("U.S. Statement") to the Assembly Decision.

[13] *Id.*

[14] New Skies Annual Report, 1998 at 28.

[15] *Supra* note 1; *see also* Assembly Decision at 1. New Skies's satellite system currently consists of four geostationary satellites and one inclined-orbit satellite transferred to it by INTELSAT, with a sixth planned to be launched in the fourth quarter of 1999 (the K-TV satellite). Of the four operational satellites, only three are positioned to provide international services to and from the United States; a fourth in orbit satellite (NSS-513) is severely inclined and is not well suited for serving U.S. points because of the inclination or the location.

8. The company was formed through the issuance of 9,000,000 shares of common stock to INTELSAT for 9,000,000 Dutch Guilders.[16] New Skies was paid 4,500,000 Dutch Guilders upon incorporation with the remaining 4,500,000 Dutch Guilders paid prior to the asset transfer discussed above.[17] New Skies and INTELSAT entered into an agreement whereby INTELSAT received an additional 1,000,000 shares of New Skies's stock in exchange for the contribution of certain assets, including five operational satellites and one satellite under construction (K-TV satellite), related assignments with associated frequencies to New Skies, and a cash contribution of $60 million.[18] Most of the customer service contracts were assigned to New Skies or continued through "leaseback" arrangements.[19] New Skies and INTELSAT also entered into several service agreements by which INTELSAT provides, on a transitional basis, operational and other support to continue satellite services until New Skies can provide such functions on its own.[20]

9. INTELSAT incurred costs related to the study and creation of New Skies and incurred internal costs associated with the construction of the K-TV satellite totaling $22,000,000.[21] A note agreement was signed on November 30, 1998 between INTELSAT and New Skies obligating New Skies to reimburse INTELSAT for these costs. The $22,000,000 note bears interest at six percent payable semi-annually, and repayment of the note is required in full within thirty days following an initial public offering by New Skies.[22] On the closing date (November 30, 1998), INTELSAT distributed 90 percent of its shares in New Skies to its investment shareholders (its Signatories). INTELSAT holds the remaining 10 percent interest in New Skies in a nonvoting trust.[23]

B. Continuity of Services

10. The Assembly Decision endorsed several means to ensure continuity of services once

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[16] 9,000,000 Dutch Guilders are approximately $4.6 million.

[17] New Skies Annual Report, 1998 at 13.

[18] Subscription Agreement between New Skies and INTELSAT at 2 ("Subscription Agreement"). *See also* New Skies's Annual Report at 28.

[19] *See infra* ¶ 63.

[20] Assembly Decision at 13.

[21] New Skies Annual Report, 1998 at 28 and 32.

[22] If New Skies does not hold its IPO, it must pay the note by December 31, 2000.

[23] Assembly Decision at 6.

satellites were transferred to New Skies. These measures included contract novation or assignment, leaseback arrangements or other "temporary measures."[24] The Assembly Decision recognized that:

> the issuance of landing rights or operating licenses and any limits on their scope and duration is the sovereign right of each country to determine and actions by governmental authorities may be guided by competition principles.[25]

11. Following New Skies's creation, the Commission notified U.S. earth station licensees, previously authorized to operate with the INTELSAT satellites transferring to New Skies, that they would need to modify their licenses in order to continue to serve the United States using a New Skies satellite.[26] The Commission stated that it would consider these applications subject to the framework established in the Commission's *DISCO II Order* implementing the U.S. WTO Basic Telecom Agreement's satellite commitments appended to the World Trade Organization's General Agreement on Trade in Services (GATS).[27] The Commission subsequently released a second Public Notice listing the modification applications that had been accepted for filing and establishing a pleading cycle to accept comments from interested parties.[28]

12. In order to continue providing services to customers after the asset transfer but prior to a Commission decision on the modification applications, licensees also submitted requests for Special Temporary Authority (STA) to operate pursuant to Section 309 of the Communications Act and Section 25.120 of the Commission's rules.[29]

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[24] *Id.* at 13.

[25] *Id.*

[26] June 1998 Public Notice. Modification applications were filed pursuant to 47 C.F.R. §25.117 and Section 309 of the Communications Act. The applications addressed in this Order and the authorizations granted are for FSS services (excluding DTH) only.

[27] *Amendment of the Commission's Regulatory Policies to Allow Non U.S. Licensed Space Stations to Provide Domestic and International Satellite Services in the United States,* Report and Order, 12 FCC Rcd 24094, 24112 (1997) (*"DISCO II Order"*), petitions for reconsideration pending, petition for review pending *sub nom*. *COMSAT Corp. v. Federal Communications Commission*, Case No. 1011 (D.C. Cir.). The *DISCO II Order* recognized that the U.S. commitments under the WTO Basic Telecom Agreement, did not include market access commitments for DTH, DBS, and DARS and adopted the ECO-Sat test for requests involving provision of DTH, DBS, and DARS by non-U.S. licensed satellites.

[28] *Satellite Radio Applications for Earth Stations to Operate with INTELSAT Satellites Transferring to New Skies Satellites N.V. Accepted for Filing*, Public Notice, Report No. DS-1874, Aug. 17, 1998 (August 1998 Public Notice).

[29] *See* June Public Notice at 2.

13. On November 30, 1998, the International Bureau released an Order granting over 90 STA requests upon transfer of the satellites to New Skies.[30] In the STA Order, the Bureau stated that in order to evaluate the modification applications, in accordance with the framework adopted in the *DISCO II Order*, it would need a complete record that includes final copies of all support service agreements negotiated between INTELSAT and New Skies as well as other relevant documentation. The STA Order ensured that earth station licensees could continue operations using the New Skies satellites, pending final action on the underlying modification applications.[31] In addition, on June 9, 1999, the Bureau granted STA requests for earth stations seeking to access the New Skies satellites, for the first time, to provide new services.[32]

14. PanAmSat Corporation (PanAmSat) filed a Petition to Deny the earth station applications seeking to access New Skies's satellites.[33] New Skies, Kelly Broadcasting Systems, Inc. (Kelly Broadcasting), BT North America, Inc. (BTNA), Comsat Corporation (Comsat) and USA Teleport, Inc. (USA Teleport) filed Oppositions to PanAmSat's Petition to Deny.[34] The Royal Netherlands Embassy and the European Commission filed letters in support of New Skies's entry into the U.S. market.[35] PanAmSat filed Reply Comments.[36] BTNA, New Skies, and

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[30] *In the Matter of Requests for Special Temporary Authority to Operate INTELSAT Satellites Transferring to New Skies Satellites, N.V*., Report and Order, DA 98-2431, November 30, 1998, ("STA Order"); *In the Matter of Requests for Special Temporary Authority to Operate INTELSAT Satellite*s *Transferring to New Skies Satellites, N.V*., Order and Authorization, DA 99-1012 (rel. May 28, 1999) (extending the term of the STAs from May 29, 1999 to June 30, 1999); *In the Matter of Requests for Special Temporary Authority to Operate INTELSAT Satellite*s *Transferring to New Skies Satellites, N.V*., Order and Authorization, DA 99-1263 (rel. June 29, 1999) (extending the term of the STAs from June 30, 1999 to July 30, 1999); *In the Matter of Satellite Radio Applications for Earth Stations to Operate with INTELSAT Satellites Transferred to New Skies Satellites, N.V*., Order and Authorization, DA 99-1515 (rel. July 30, 1999) (extending the term of the STAs from July 30, 1999 to August 29, 1999).

[31] STA Order at 3.

[32] *In the Matter of the Satellite Radio Applications for Earth Stations To Operate with INTELSAT Satellites Transferred to New Skies Satellites, N.V*., Order and Authorization, DA 99-1093 (rel. June 9, 1999).

[33] PanAmSat's Petition to Dismiss, Deny, or Defer, September 18, 1998 ("PanAmSat's Petition to Deny").

[34] Opposition of New Skies to PanAmSat's Petition to Deny, October 13, 1998 ("New Skies's Opposition"); Opposition of Kelly Broadcasting, October 9, 1998 ("Kelly Broadcasting's Opposition"); Opposition of BT North America, Inc. to PanAmSat's Petition to Deny, Oct.13, 1998 ("BTNA's Opposition"); Opposition of Comsat Corporation, Nov. 12, 1998 ("Comsat's Opposition"); USA Teleport Opposition to PanAmSat's Petition to Deny, Oct. 1, 1998 ("USA Teleport's Opposition").

[35] Letter from Eduard V. Sierp, Counselor for Transportation, Royal Netherlands Embassy, Oct. 13, 1998; Letter from H.F. Beseler, Director General, External Relations: Commercial Policy and Relations with North America, the Far East, Australia and New Zealand, European Commission to Stuart E. Eizenstat, Under Secretary for Economic, Business and Agricultural Affairs, Department of State, June 16, 1999;

Comsat also filed Reply Comments.[37] In February of 1999, New Skies filed documents requested by the Bureau in the STA Order.[38] New Skies has filed additional *ex parte* letters on several subsequent occasions.[39] PanAmSat filed a response to New Skies's *ex parte* letters.[40]

Letter from Robert Verrue, Director-General, Information Society: Telecommunications Markets, Technologies--Innovation and Exploitation of Research, European Commission to William Kennard, Chairman, Federal Communications Commission, June 17, 1999; Letter from Robert Verrue, Director-General, Telecommunications Markets, Innovation and Exploitation of Research, European Commission to William Kennard, Chairman, Federal Communications Commission, July 30, 1999.

36 Consolidated Reply Comments of PanAmSat Corporation, Oct. 23, 1998 ("PanAmSat's Reply Comments").

37 Letter from Cheryl L. Schneider and Eric H. Loeb, Attorneys for BT North America, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission, Nov. 13, 1998 ("BTNA Letter"); Reply Comments of Comsat Corporation, Oct. 13, 1998 ("Comsat's Reply Comments"); USA Teleport, Inc. Opposition, Nov. 9, 1998 ("USA Teleport's Opposition"); New Skies and USA Teleport filed additional Oppositions against a second PanAmSat Petition to Deny filed in response to additional earth station modification applications put on public notice. USA Teleport Opposition to PanAmSat, Nov. 9, 1998 and New Skies's Opposition to PanAmSat's Petition to Deny, Nov. 12, 1998. These two additional Oppositions raise the same arguments as the original Oppositions.

38 Letter from Stephen L. Goodman, Counsel for New Skies to Regina Keeney, Chief, International Bureau, regarding "Supplemental Materials Concerning the Applications to Use the New Skies Satellites--*Ex Parte* Submission," Feb. 1, 1999.

39 Letter from Stephen L. Goodman, Counsel for New Skies to Regina Keeney, Chief, International Bureau, regarding "Supplemental Materials Concerning the Applications to Use New Skies Satellites--*Ex Parte* Submission," Feb. 22, 1999 ("Articles of Association Letter"); Letter from Stephen L. Goodman, Counsel for New Skies to Regina Keeney, Chief, International Bureau regarding "Supplemental Materials Concerning the Applications to Use the New Skies Satellites--*Ex Parte* Submission," March 11, 1999 ("March 11 Letter"); Letter from Stephen L. Goodman, Counsel for New Skies to Magalie Roman Salas, Secretary, FCC regarding "Supplemental Materials Concerning the Applications to Use the New Skies Satellites--Confidentiality Request," March 12, 1999 ("March 12, 1999 Letter"); Letter from Stephen L. Goodman, Counsel for New Skies to Magalie Roman Salas, Secretary, FCC regarding "Supplemental Materials Concerning the Applications to Use the New Skies Satellites--Confidentiality Request," March 22, 1999 ("March 22, 1999 Letter"); Letter from Andrew R. D' Uva, Associate General Counsel, New Skies to James Ball, Associate Chief, Policy, International Bureau, FCC, April 8, 1999 ("April 8, 1999 Letter"); Letter from Daniel Goldberg, General Counsel and Andrew R. D' Uva, Associate General Counsel, New Skies to Rod Porter, Acting Bureau Chief, International Bureau, FCC, May 17, 1999 ("May 17, 1999 Letter"); Letter from Daniel Goldberg, General Counsel and Andrew R. D' Uva, Associate General Counsel, New Skies to Rod Porter, Acting Bureau Chief, International Bureau, FCC, May 27, 1999 ("May 27, 1999 Letter"); Letter from Daniel Goldberg, General Counsel and Andrew R. D' Uva, Associate General Counsel, New Skies, to Rod Porter, Acting Bureau Chief, International Bureau, FCC, June 16, 1999 ("June 16, 1999 Letter"); Letter from Stephen L. Goodman, Counsel for New Skies Satellites to Magalie Roman Salas, Secretary of FCC, June 22, 1999 ("June 22, 1999 Letter"); Letter from Stephen L. Goodman, Counsel for New Skies Satellites to Donald Abelson, Chief, International Bureau,

Columbia Communications Corporation (Columbia) and Ellipso, Inc. (Ellipso) filed *ex parte* letters asking the Commission to defer action on the New Skies applications until New Skies can make a showing that it has been privatized and is operating independent of INTELSAT.[41] Williams Communications, Inc., also filed an *ex parte* letter asking the Commission to approve the New Skies applications.[42] We also have received letters from Members of Congress, some supporting New Skies's entry into the U.S. market and others expressing their opposition to New Skies's entry into the U.S. market.[43] PanAmSat, however, requests that the Commission authorize New Skies for a limited two-year term because of various competitive concerns.[44]

FCC, July 26, 1999 ("July 26, 1999 Letter").

40 Letter from Kalpak S. Gude, Vice President and Associate General Counsel, PanAmSat to Chairman William E. Kennard, Chairman, Federal Communications Commission, June 10, 1999 ("June 10, 1999 PanAmSat Letter").

41 Letter from Kenneth Gross, President and Chief Operating Officer, Columbia Communications Corporation to Chairman William E. Kennard, Federal Communications Commission, June 16, 1999 ("Columbia Letter"); Letter from Gerald B. Helman, Vice President, International and Government Affairs, Ellipso, Inc., to Chairman William E. Kennard, Federal Communications Commission, June 30, 1999 ("Ellipso Letter").

42 Letter from Benjamin J. Griffin, Counsel for Williams Communications, Inc., to Donald Abelson, Chief, International Bureau, July 21, 1999 (Williams Letter).

43 Letter from Peter Deutsch, 20th District, Florida, House of Representatives to Chairman William Kennard, FCC, June 24, 1999 (opposing grant of permanent authority to New Skies to access the U.S. market as currently structured); Letter from Tom Bliley, Chairman and Edward J. Markey, Ranking Democrat, Subcomm. on Telecommunications, Committee on Commerce, House of Representatives, to William E. Kennard, Chairman, FCC, July 15, 1999 (opposing grant of permanent authority to New Skies to access the U.S. market because it may undercut legislative efforts on satellite reform); Letter from Ernest F. Hollings and Ted Stevens, Committee on Commerce, U.S. Senate, July 20, 1999 (opposing grant of permanent authority to New Skies to access the U.S. market because it may undercut legislative efforts on satellite reform); Letter from John D. Dingell, Ranking Member, Committee on Commerce, House of Representatives, to Chairman William Kennard, FCC, July 23, 1999 (supporting unconditional grant of permanent authority to U.S. earth stations accessing the New Skies satellites); Letter from Billy Tauzin, Chairman, House Subcomm. and Consumer Protection to Chairman, William Kennard, FCC, July 29, 1999 (supporting New Skies unconditional entry to the U.S. market); Letter from John McCain, Chairman, Committee on Commerce, U.S. Senate, August 4, 1999 (asking the Commission carry out its statutory responsibilities by issuing an opinion and observing the terms of the WTO Basic Telecommunications Agreement).

44 PanAmSat's Petition to Dismiss, Deny, or Defer at 13 (arguing that New Skies should be given one year within which to demonstrate compliance with the *DISCO II* entry criteria); PanAmSat's Reply Comments at 2 (upon reviewing other comments in the proceeding, PanAmsat revised its views and argued that New Skies should be granted a two-year temporary license).

III. DISCUSSION

15. New Skies was created to provide multi-regional video distribution, interactive multimedia services to residential and business customers and DTH satellite services.[45] The intent, according to New Skies, was to create a new, effective competitor free from the constraints INTELSAT has experienced as an IGO in responding to competition, but not having the attributes that INTELSAT's competitors have contended give an IGO competitive advantages. The Assembly Decision states that the Assembly's goal was to create a new company that ultimately would become independent of INTELSAT.[46] The United States supported the Assembly Decision, provided that it would result in true separation and independence between INTELSAT and New Skies.[47]

16. The United States had two primary concerns during negotiations to create New Skies: (1) that New Skies not be accorded preferential market access or unfairly benefit from its INTELSAT heritage; and (2) New Skies and INTELSAT not be able to engage in collusive or market distorting behavior through cross-subsidization and other means. Additionally, the United States recognized that the benefits of introducing a new competitor would not be fully realized if New Skies operated as a mirror image of INTELSAT. These concerns and the U.S. policy goal that New Skies be independent of INTELSAT were reflected in our 1997 *DISCO II Order* implementing the WTO Basic Telecom Agreement. The action we take here, under the Commission's *DISCO II* standard, is intended to be consistent with and ensure the fulfillment of the 1998 Assembly Decision.

A. *DISCO II* Standard

17. In November 1997, the Commission issued regulations implementing our commitment under the WTO Basic Telecom Agreement to open the United States's FSS and mobile satellite service markets to satellites licensed by WTO countries.[48] In the *DISCO II Order* we adopted a presumption in favor of entry for non-U.S. satellites licensed by a WTO member.[49] We also stated that the presumption could be rebutted by a showing of potential for competitive harm. In these cases, we reserved the right to attach conditions to any grant of authority.[50] In the *DISCO II Order,* we also held that, in the exceptional case, in which an application would pose a very high risk to competition in the U.S. satellite market, we would deny the application.[51]

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[45] Assembly Decision at 5.

[46] Assembly Decision at 7.

[47] U.S. Statement at ¶ 2.

[48] *DISCO II Order,* 12 FCC Rcd 24094, 24102; *see also* General Agreement on Trade in Services, WTO Agreement, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 325 (GATT Secretariat 1994), 33 I.L.M. 1167 (1994) [hereinafter GATS]. Under

18. In the *DISCO II Order*, we recognized that prospective affiliates of IGOs, such as INTELSAT or Inmarsat, raised special competition concerns because of their unique institutional heritage.[52] Thus, we set forth specific criteria to apply in determining whether an application to serve the U.S. market by an IGO affiliate, with satellites authorized by a WTO country, raises the potential for competitive harm. Specifically, we stated that we would consider any potential anticompetitive or market distorting consequences of continued relationships or connections between the IGO and its affiliate, particularly, the risk or likelihood of collusive behavior or cross-subsidization.[53]

19. We stated that we would evaluate the ownership structure of the IGO affiliate, including its affiliation with INTELSAT, the effect of INTELSAT and Signatory ownership, and whether the affiliate can directly or indirectly benefit from IGO privileges and immunities. We also stated we would evaluate whether an arm's-length relationship exists between the IGO and the affiliate.[54] This evaluation would consider the extent to which there are separate directors, officers, employees, and accounting systems, as well as fair market valuing for permissible business transactions, verifiable by an independent audit and consistent with normal commercial practices.[55] We noted that, in conducting our analysis, we would consider other

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Article II of the GATS, all WTO members must provide "Most-Favored-Nation" (MFN) treatment to like services and service suppliers from other WTO members, regardless of the commitments undertaken by any individual member. The MFN obligation precludes a WTO member from discriminating among services or service suppliers of other members. It means that a WTO member that commits to open its market for a certain service cannot close its market on a selective basis to like services or service suppliers from any WTO member. In addition to the MFN obligation, all WTO members must comply with the transparency obligations of Article III of the GATS, which requires prompt publications of all laws and regulations applicable to the provision of services.

[49] *DISCO II Order*, 12 FCC Rcd at 24107-24113.

[50] *Id.*

[51] *Id.*

[52] *Id*. at 24150-24155.

[53] *Id.* "In determining whether an application to serve the U.S. market by an IGO affiliate raises the potential for competitive harm, we will consider any potential anticompetitive or market distorting consequences of continued relationships or connections between an IGO and its affiliate. For example, we will look at whether the affiliate is structured to prevent practices such as collusive behavior or cross-subsidization."

[54] *Id.*

[55] "Permissible business transactions" are transitional services that would be consistent with an arm's- length relationship such as tracking, telemetry, and control (TT&C) services.

issues, such as the extent of common marketing or recourse to the IGO's assets for credit or capital, and whether the IGO registers or coordinates spectrum or orbital locations on behalf of its affiliate.[56]

20. Finally, the *DISCO II Order* stated that the Commission, when considering the competitive impact of the IGO affiliate's entry into the U.S. market, would specifically consider any arrangements agreed to by the United States as a result of any international negotiations.[57] Thus, we must consider the effect of the Assembly Decision in applying our *DISCO II* standards to applications seeking to operate with New Skies for services, to, from and within the United States.

21. The concerns we raised in the *DISCO II Order* regarding the legacy of IGO affiliates, and their potential to undermine competition, were well-founded. A GAO Report has found that approximately 94 percent of INTELSAT's Signatories are partially government-owned, and 83 percent are completely government-owned and operated.[58] Moreover, 71 percent of the Signatories also operate as their country's regulatory authority, responsible for decisions on licensing, spectrum allocation and market access.[59] Most of the high-growth markets for new video services are located in countries in which the Signatory is also the regulatory authority. The GAO Report also notes that independent satellite systems have long complained that the Signatories were using their authority to favor INTELSAT by authorizing earth stations only if they serve INTELSAT's satellites, assessing prohibitively high tariffs on smaller earth stations used by private satellite systems, and denying or restricting access to necessary radio spectrum within the countries for the transmission of satellite signals.[60] In view of the potential of many Signatories to either control or influence the terms of access to their national markets, the creation of a global satellite provider owned by INTELSAT and its Signatories raised concerns that such provider would enjoy privileged market access in a number of countries or that its competitors would be denied significant market access opportunities.[61]

B. INTELSAT Assembly of Parties Decision

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[56] *DISCO II Order*, 12 FCC Rcd 24154.

[57] *Id*.

[58] General Accounting Office, "Competition Issues in International Satellite Communications," GAO/RCED-97-1, October 1996 at 45.

[59] *Id.*

[60] *Id.*

[61] U.S. Statement at ¶ 2.

22. In view of these concerns, the Assembly undertook measures to assure the independence of New Skies from INTELSAT and a pro-competitive outcome of the creation of New Skies.[62] The Assembly decided: (1) that there should be a "natural dilution" of Signatory ownership in New Skies through an initial public stock offering (IPO) and voluntary share trading;"[63] and (2) to adopt various competitive safeguards to assure fair competition between New Skies and its competitors.[64] These provisions were central to U.S. support for the Assembly Decision.[65]

23. The Assembly noted that in order to raise the very sizeable requirement for development capital, that New Skies [INC] will have early in its existence, "an IPO will take place by the end 1999 and, subject to market conditions being favorable, as end early as June 1999."[66] The Assembly, however, declined to mandate a specific date for the IPO and did not specify a percentage of Signatory ownership that should be targeted for dilution. Instead, with the objective of ensuring independence from INTELSAT, the Assembly created an *ex post* review process that focused on the ownership structure of New Skies. Specifically, the *ex post* review process provides that "natural dilution" should achieve a "substantial" non-Signatory ownership in New Skies at the end of a fixed period of time.[67] The review process requires that New Skies's "best efforts to achieve an appropriate level of non-Signatory ownership will be considered by competition authorities" and that authorities "will monitor and regulate INC's commercial activities, including its efforts to increase the level of or accelerate the pace of non-Signatory ownership, in accordance with national and multinational competition law and regulatory policy."[68]

24. The INTELSAT Assembly also concluded that it was necessary to adopt "meaningful and effective safeguards to assure fair competition between INC and its competitors."[69] These competitive safeguards were intended to ensure that New Skies did not derive competitive advantages from its relationship with INTELSAT and the Signatories. The safeguards include: (1) a waiver by INTELSAT and the Signatories of their privileges and immunities with respect

[62] Assembly Decision at 7-8.

[63] *Id.*

[64] *Id.* at 9.

[65] *See generally* U.S. Statement.

[66] Assembly Decision at 6.

[67] *Id.* at 8.

[68] *Id.*

[69] *Id.* at 9.

to their relationship with New Skies; (2) location of New Skies's headquarters operations in a country that honors international discovery requests; (3) no participation by nor responsibility of INTELSAT for ITU registration or coordination activities on behalf of New Skies after transfer of the satellites; and (4) a clearly defined and visible arm's-length relationship between New Skies and INTELSAT.[70]

25. The language in the Assembly Decision ensuring an arm's-length relationship between New Skies and INTELSAT mirrors the *DISCO II* standard for IGO affiliates. Under the Assembly Decision, a proper arm's-length relationship between New Skies and INTELSAT requires:
(1) separate officers, directors, employees, headquarters and accounting systems; (2) fair market value for permissible transactions verifiable by an independent audit process as appropriate and consistent with normal commercial practice; (3) no common marketing or recourse to INTELSAT assets for New Skies credit; (4) transitional contracts valued at a verifiable fair market price for a limited period of time to be negotiated between the Board of Governors and New Skies management after which New Skies would be able to procure such services through open competitive tender; and (4) Party inspection of all contracts and transaction between INTELSAT and New Skies.[71] Finally, as to the transitional services,[72] the INTELSAT Assembly concluded that "it is essential that the duration of the transitional services be limited and that a pure arm's-length relationship between INTELSAT and New Skies is established as soon as possible."[73]

26. In addition, the Assembly Decision provides for: (1) a commitment from New Skies not to seek exclusive authorization to provide services in any country or region; and (2) an agreement by Signatories subscribing to New Skies not to foreclose landing rights to New Skies's competitors where the Signatories have such authority under national law.[74] Finally, the INTELSAT Assembly recognized that any limits on the scope and duration of landing rights or operating licenses "is the sovereign right of each country," and that "actions by governmental authority may be guided by competition principles."[75]

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[70] *Id.* at 9-10.

[71] *Id.*

[72] Transitional services include: information systems support, financial and administrative systems, booking services, and engineering services.

[73] Assembly Decision at 14.

[74] *Id.* at 9.

[75] *Id.* at 13.

C. Analysis of New Skies Relationship with INTELSAT

27. As an IGO affiliate, New Skies's entry into the U.S. market must be analyzed in accordance with the IGO affiliate standard adopted in the *DISCO II Order*. In applying the *DISCO II* standard to the earth station applications seeking to operate with New Skies satellites, and consistent with the INTELSAT Assembly Decision, we consider the potential for any anticompetitive or market distorting consequences of continued relationships or connections between New Skies and INTELSAT. For purposes of this analysis, we address: (1) the ownership structure of New Skies; (2) privileges and immunities; and (3) arm's-length safeguards.[76]

1. Ownership

28. *Market Access.* PanAmSat argues that because New Skies is 90 percent owned by INTELSAT's Signatories, the vast majority of whom control landing rights in their home countries, New Skies holds an advantage over PanAmSat and other competitors when trying to gain market access.[77] According to PanAmSat, New Skies's owners have the ability and the incentive to discriminate against New Skies's competitors in their home markets. PanAmSat contends that even a Signatory with a small stake in New Skies stands to gain by ensuring that New Skies provides satellite services to that Signatory's home market rather than an unaffiliated competitor.[78]

29. Moreover, New Skies's current ownership structure also could create the potential for collusion among its current investors.[79] For example, New Skies's current owners, which include some of the largest telecommunications providers in the world, potentially could use New Skies to coordinate certain business activities to the detriment of consumers. Because many of the Signatories are still the dominant suppliers of telecommunications services in their respective countries and presumably have an incentive to slow the rate of competition into their countries, they might find New Skies a vehicle through which to come together and attempt to restrain or reduce competitive entry and competitive price pressures in their respective countries.

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[76] *DISCO II Order*, 12 FCC Rcd 24150.

[77] PanAmSat's Petition to Deny at 9-11; PanAmSat's Reply Comments at 6; June 10, 1999 PanAmSat Letter at 6-7.

[78] June 10, 1999 PanAmSat Letter at 7.

[79] *See AT&T et. seq., Joint Application for a License to Land and Operate a Submarine Cable Network between the United States and Japan,* FCC 99-167 (rel. July 9, 1999) (where the Commission addressed concerns that a consortium structure for owning and operating a proposed submarine cable system would lead to collusion and discrimination against carriers using competing cable systems).

30. New Skies and other commenters in this proceeding dispute these concerns. First, New Skies claims that the *DISCO II Order* states that when non-U.S. satellite service providers, such as New Skies, are licensed by WTO Members, they are not subject to a market entry analysis. New Skies and USA Teleport argue that the *DISCO II Order* states that the WTO status of the country authorizing the satellites seeking to serve the United States, and not the ownership structure of the satellite operator, is dispositive of market entry.[80] We disagree with New Skies and USA Teleport that the *DISCO II Order* foreclosed an evaluation of the ownership structure of the satellite operator. The IGO affiliate standard adopted in the *DISCO II Order* specifically provides that in assessing the competitive effect of an IGO affiliate entering the U.S. market, we must consider "the ownership structure of the affiliate and the effect of IGO and other Signatory ownership . . ."[81] In addition, the *ex post* review process, adopted in the Assembly Decision, compels New Skies to provide to competition authorities in the jurisdictions in which it operates information regarding its ownership makeup and other information required of commercial companies.[82]

31. Second, New Skies, BTNA, and Comsat assert that, in any event, Signatories owning New Skies's shares committed, in the Assembly Decision, that they would not foreclose landing rights to New Skies's competitors.[83] Moreover, New Skies and Comsat state that only nine of New Skies's shareholders directly hold more than two percent of New Skies's shares, noting that all are from WTO member countries and must comply with the non-discrimination obligation under the WTO Agreement.[84] New Skies contends that its remaining shareholders each holds less than two percent of New Skies's shares, with the vast majority of these entities holding interests of less than one percent.[85] According to New Skies, these small ownership interests would not induce shareholders to favor New Skies if another business deal was more attractive.[86]

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80 May 17, 1999 Letter at 6*;* USA Teleport Opposition at 4.

81 *DISCO II Order,* 12 FCC Rcd 24150.

82 Assembly Decision at 8.

83 New Skies's Opposition at 6; BTNA's Opposition at 5; Comsat's Reply Comments at 22; Assembly Decision at 10.

84 May 17, 1999 Letter at 10; Comsat's Reply Comments at 24. The MFN obligation under the WTO Basic Telecom Agreement means that a WTO Member that did not make market access commitments for satellite services must not give less favorable treatment to a foreign satellite system than to a system licensed in any other WTO Member country, if that WTO member decides to open its market to a particular service.

85 May 17, 1999 Letter at 10.

86 *Id.* at 11.

32. Despite New Skies's assertions to the contrary, we recognize and share PanAmSat's concerns that New Skies's current ownership structure, if left intact, could give New Skies an advantage when seeking market access. The WTO protections cited by New Skies as limiting the ability of INTELSAT's Signatories to discriminate, in terms of market access in favor of New Skies, are not available in countries that are not members of the WTO.[87] We note that both non-WTO Signatories and New Skies may benefit by restricting market access to New Skies's competitors. First, Signatories from non-WTO countries hold ten percent of New Skies's voting shares.[88] These non-WTO investors account for approximately 30 percent of the world's population and 18 percent of world Gross Domestic Product (GDP).[89] In addition, the non-WTO investors in New Skies are among the 71 percent of INTELSAT Signatories that are wholly or partially owned by the national government or an agency of the government and continue to control or influence access to a significant amount of international telecommunication traffic.[90] Moreover, barriers to entry (i.e., obtaining landing rights) in many of these non-WTO countries make it difficult for satellite service providers, including U.S. satellite providers, to begin providing services in these markets. A non-WTO member country, whose Signatory is also an investor in New Skies, has the financial incentive and the ability to permit New Skies entry into its market while discriminating against other satellite competitors (such as PanAmSat, Loral-Orion, Columbia and GE American). The Signatories may either deny access or permit access to New Skies's competitors under less favorable terms and conditions. This type of preferential market access may pose competitive concerns.

33. Second, as we have recognized, many large multinational corporations seek to develop relationships with telecommunications companies that can provide telecommunications services to, from, and within many countries in all parts of the world.[91] As we explained above, because of New Skies's ownership structure and its relationship with INTELSAT and its Signatories, New Skies may be able to obtain access to some countries that other competing satellite companies will be unable to obtain. Clearly this would give New Skies a competitive advantage in obtaining multinational corporate clients. If New Skies simply offered lower

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87 *See also Comsat Corporation: Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance From Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083 (1998) ("Comsat Non-Dominance Order") (explaining that "thin-route" markets (routes that are not linked to the United States by cable and generally rely on INTELSAT as the sole provider of service) are generally non-WTO member countries).

88 May 17, 1999 Letter at 11.

89 Central Intelligence Agency, World Fact Book, 1998.

90 *See supra* note 57.

91 *In the Matter of The Merger of MCI Communications Corporation and British Telecommunications PLC,* GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, at ¶ 56-57 (1997).

prices or better services than its competitors because it were more efficient, the fact that it attracted customers away from competitors would not raise competitive issues here. However, to the extent that New Skies may be able to use its relationship with INTELSAT and its Signatories to prevent other companies from providing services to the same number of foreign countries, or could make it more costly for competitors to provide service into some of the countries in which they were able to obtain access, then New Skies would indeed pose a potential for competitive harm.

34. These potential advantages might enable New Skies to outbid or underprice its rivals. In the extreme case, New Skies might even be able to drive some of its weaker competitors out of business, or at least reduce the probability of new entry by additional satellite competitors. If New Skies were successful in such a strategy, it would then have more power in the future to raise prices or dictate other terms and conditions to its customers in a market that had become less competitive. In order to ensure that New Skies becomes independent and does not have the incentive and ability to engage in activities that could potentially harm competition, we grant the earth stations accessing the New Skies satellites licenses that are shorter in duration than a full 10-year term license.[92] This approach allows us to engage in the ex post review process adopted by the Assembly of Parties, which specifically calls for authorities such as this Commission to consider efforts to increase the level of or accelerate the pace of non-Signatory ownership.[93]

35. We recognize that 90 percent of New Skies voting shares are held by Signatories from WTO countries that must adhere to the general WTO principles of most-favored nation (MFN) and Transparency, that the individual INTELSAT Signatory investors have a relatively small ownership stake in New Skies,[94] and that fifty-six members of the WTO, also members of INTELSAT and investors in New Skies, agreed to open markets for all or selected services provided by satellites.[95] The general MFN obligation requires a WTO Member to treat all foreign satellite operators the same once it opens its market to a particular foreign operator.[96] Our concerns regarding the potential for New Skies's current owners to unfairly restrict market access by New Skies's competitors and to coordinate business strategies to the detriment of consumers are lessened, to some extent, by these factors, which may reduce the incentive of the shareholders to restrict market access or use New Skies to coordinate their business activities. The presence of these factors add to our conclusion that the risk of competitive harm is not so

[92] 47 C.F.R. § 25.121(c).

[93] Assembly of Parties Decision at 7-8.

[94] May 17, 1999 Letter at 10.

[95] Laura B. Sherman, *'Wildly Enthusiastic' About the First Multilateral Agreement on Trade in Telecommunications Services*, 51 FED. COMM. L.J. 61, 63 (1998).

[96] General Agreement on Trade in Services, WTO Agreement, Annex 1B, *supra* note 47.

high as to warrant denial of the applications and find instead, that a three-year license term is appropriate given the potential for competitive harm.

36. *Initial Public Offering*. According to PanAmSat and Columbia, in view of New Skies's current relationship with INTELSAT and its Signatories, the Commission should not grant a permanent authorization to New Skies at this time. They argue that if the Commission were to grant New Skies permanent authority to serve the U.S. market prior to the IPO, there would be no realistic opportunity to assess the effect of the IPO on the ownership structure.[97] Moreover, PanAmSat argues that New Skies has done no more than make preliminary plans to have an IPO.[98]

37. New Skies asserts that it intends to dilute ownership through an IPO and voluntary share trading in public markets.[99] However, as a new business, New Skies notes that its bankers have advised it that prior to an IPO, New Skies must: (1) complete the task of establishing its corporate infrastructure and largely assume those limited functions now being performed by INTELSAT; (2) establish a credible commercial track record; and (3) clearly articulate a long-term growth strategy.[100] New Skies also asserts that its management is committed to completing the IPO and plans to commence an offering in the first quarter of 2000 in order to: (1) raise much-needed capital for fleet expansion and replacement; (2) satisfy the desires of many of its shareholders to create the means for them to monetize their stake in New Skies; and (3) create a "currency" with which management can pursue strategic acquisitions and other transactions.[101]

38. As described above, the Assembly Decision does not legally commit New Skies to hold an IPO; it simply states that reliance on natural dilution through an IPO and voluntary share trading on public markets are means to achieving "substantial non-Signatory ownership."[102] Moreover, the Assembly Decision states:

> Interested national and multinational competition authorities will communicate their views regarding the appropriate levels for non-Signatory ownership in New Skies, and will review the plans of New

[97] June 10, 1999 PanAmSat Letter at 4; Columbia Letter at 2.

[98] June 10, 1999 PanAmSat Letter at 3.

[99] New Skies's Opposition at 15.

[100] June 16, 1999 Letter at 1.

[101] May 17, 1999 Letter at 6; June 16, 1999 Letter at 1.

[102] Assembly Decision at 8.

Skies's board and management to achieve those levels.[103]

39. The U.S. Statement to the Assembly Decision, however, emphasized the importance of achieving New Skies's independence from INTELSAT in a timely way. Fundamentally, the U.S. Statement affirmed that New Skies's independence is based on "the speed with which INC [New Skies] proceeds with an IPO and the size of that IPO."[104] Yet, New Skies indicates that an IPO will be held in the first quarter of 2000, and not in 1999 as anticipated by INTELSAT, because of market conditions.[105] Therefore, it is now clear that New Skies will not be able to fulfill the expectations that an IPO would be held in 1999 -- expectations upon which the United States relied when associating with the Assembly Decision.[106]

40. We realize that there was a five-month delay in New Skies becoming operational, and that this may have been a cause of the delay in the IPO. We also recognize that the timing and size of the IPO is dependent upon numerous market factors. We therefore will not mandate that New Skies hold an IPO within a specified time. Nevertheless, we agree with Comsat that the Assembly Decision provides for a process by which regulatory authorities can monitor New Skies's efforts to achieve a reasonable level of non-Signatory ownership, and to take appropriate action if New Skies fails to do so.[107] We also believe that non-Signatory ownership in New Skies remains essential to achieve an independent New Skies, and is necessary to avoid the potential for New Skies to secure market access advantages over its competitors.[108] Therefore, consistent with our *DISCO II* standard and the Assembly Decision, and in recognition of the public interest benefits to be gained from this decision, as described herein, we encourage New Skies to continue its efforts to become independent of INTELSAT as anticipated by the Assembly Decision, including achieving a substantial level of non-Signatory ownership.[109] We also

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[103] *Id.*

[104] U.S. Statement at ¶ 2.

[105] New Skies's Annual Report at 10.

[106] *See generally The Communications Satellite Competition and Privacy Act of 1997: Hearing on H.R. 1872 Before the Subcomm. on Telecommunications of the House Comm. on Commerce,* 105th Cong., 1st Ses. (1998) (statement of Vonya B. McCann, Ambassador and United States Coordinator for, International Communications and Information Policy).

[107] Comsat's Reply Comments at 11; Assembly Decision at 8.

[108] *See* U.S. Statement at ¶ 2.

[109] Assembly Decision at 6. Consistent with the Assembly Decision, we decline to define what constitutes "substantial non-Signatory ownership." But, we believe that market forces will ensure that a significant amount of equity will be sold during the IPO to ensure New Skies's ownership is separate from INTELSAT.

impose quarterly reporting requirements on New Skies as to its progress toward this goal. Such a report shall include information on: (1) selection of an investment bank/underwriter; (2) filing of the registration statement with the Securities and Exchange Commission; (3) completion of relevant financial analysis and due diligence; and, (4) a copy of the Preliminary Prospectus and the Final Prospectus (when made available to the general public).

2. Privileges and Immunities

41. INTELSAT is entitled to immunity from national laws and courts. For example, INTELSAT does not have to pay corporate taxes and is not subject to employment laws, and is completely immune from antitrust suits.[110] In contrast, New Skies does not have any privileges and immunities and *will* be subject to antitrust actions.[111] Moreover, the Assembly agreed to a limited waiver of INTELSAT's immunity from suit involving matters that relate to its relationship with New Skies.[112]

42. PanAmSat states that the ongoing relationship between New Skies and INTELSAT gives New Skies an advantage over other competitors.[113] New Skies responds by arguing that the Assembly Decision incorporates a number of safeguards to ensure that the creation of New Skies will enhance competition, including the decision that New Skies has no "privileges and immunities" and will be subject to lawsuits and discovery requests just like any other Netherlands corporation.[114]

43. The Assembly Decision does not extend INTELSAT's privileges and immunities to New Skies. Therefore, New Skies will operate in the U.S. market subject to the same laws that apply to U.S. satellite service providers. Moreover, the Assembly Decision specifically waives INTELSAT's privileges and immunities with respect to INTELSAT's relationship with New Skies. INTELSAT's waiver provides additional safeguards against INTELSAT and its Signatories when engaging in activities on behalf of New Skies. Given that New Skies is not afforded the competitive benefit of privileges and immunities and INTELSAT has waived its privileges and immunities with respect to its relationship with New Skies (as an additional

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[110] Agreement Relating to the International Telecommunication Satellite Organization,, and Operating Agreement, August 20, 1971, art. XV(c), 23 U.S.T. 3813.

[111] Assembly Decision at 9.

[112] *Id.* INTELSAT has waived its immunity from lawsuit for government antitrust actions and will be subject to lawsuit by private parties for damages and/or injunctive relief. Also, the terms of this waiver will apply to Comsat as well, in its role as U.S. Signatory to INTELSAT.

[113] PanAmSat's Reply at 6.

[114] New Skies's Opposition at 5.

safeguard against competitive harm), we find that no market distorting consequences exist with regard to INTELSAT's privileges and immunities.

3. Arm's Length Relationship between INTELSAT and New Skies

a. Separate Officers/Directors/Employees

44. Under New Skies's Articles of Corporate Governance, New Skies is governed by a Supervisory Board which is equivalent to a Board of Directors, and a Management Board that comprises the officers of the company.[115] Members of the Supervisory Board are appointed and dismissed by New Skies's shareholders.[116] However, the New Skies Articles of Association provide that no member of the Supervisory Board may be a concurrent member of INTELSAT's Board of Governors or an employee of INTELSAT.[117] The General Meeting of New Skies's shareholders also determines the number of members of New Skies's Management Board.[118] The Management Board is in charge of the day-to-day management of New Skies.[119]

45. PanAmSat argues that although INTELSAT's management and employees are barred from participating as members of New Skies's "Supervisory Board," this restriction is virtually meaningless because there are no requirements that the members of New Skies's "Management Board" be independent of INTELSAT.[120] According to PanAmSat, there is nothing to prevent INTELSAT's management from participating in or even controlling the Board of Management or taking executive positions in the company.[121] Moreover, PanAmSat and Columbia argue that New Skies's current Supervisory Board members have close connections to INTELSAT's

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[115] New Skies's Articles of Association, Articles 14 and 18.

[116] Article 18 (11).

[117] Articles of Association, Article 18 (1). The Articles of Association state that there will be seven initial members of the Supervisory Board but that the number shall automatically increase to nine at the General Meeting of Shareholders. According to the Articles of Association, these two additional members shall be independent and shall not be employees, officers, representatives of any shareholders.

[118] New Skies's Articles of Association, Article 14 (1)-(3). The General Meeting of Shareholders appoints the members of the Board of Management from a list of at least two nominees for each position as well. This list is prepared by the Supervisory Board. New Skies's executive officers are selected from the Management Board.

[119] Articles of Association, Article 15 (1).

[120] PanAmSat's Petition to Deny at 10.

[121] *Id.*

Signatories.[122] We also note that, if the management were not independent, New Skies's current ownership structure could create the potential for collusion between New Skies and INTELSAT. Instead of deciding when, where, and how to compete in a manner designed to advance its business interests, New Skies's current owners could control the operations of the company in a manner that advances the interests of INTELSAT. Absent separate officers, directors, and employees, New Skies and INTELSAT might have an incentive to share marketing information or implicitly or explicitly make arrangements to divide up markets in terms of either services supplied or particular country routes or regions of the world to be served. If implemented, such a strategy could reduce or prevent competition between the two companies and thus make it easier for them to raise prices with respect to those geographic markets or particular services. In other words, the two entities might find it in their interest to collude in setting prices or determining what services to provide.

46. According to New Skies, its current management team and five of the nine current members of the Supervisory Board have no ties to INTELSAT or its Signatories.[123] This action, according to New Skies, underscores its commitment to operate as a stand-alone commercial satellite operator wholly independent of INTELSAT.[124] Furthermore, New Skies asserts that the Supervisory Board cannot have any INTELSAT officers, employees or Governors as reflected in the New Skies's Articles of Association.[125] Comsat, BTNA, and New Skies claim that PanAmSat's contentions that INTELSAT will control the day-to-day operations of New Skies are false.[126] Comsat cites the Assembly Decision's language calling for "separate officers, directors, and employees," and also notes that the creation of the dual board system was necessary to comply with Netherlands law.[127]

47. We recognize PanAmSat's concerns that no specific language exists in New Skies's Articles of Association that prohibits INTELSAT employees and or management from exerting control of New Skies's Management Board. However, we note that several members of New Skies's Management Board were employed by PanAmSat before being employed by New

[122] PanAmSat Letter at 4; Columbia Letter at 2 (generally arguing that a majority of New Skies's directors continue to be representatives of INTELSAT Signatories and the directors must answer to the shareholders--INTELSAT and its Signatories--which can make a change in management for any reason, at any time).

[123] June 22, 1999 Letter at 1.

[124] May 27, 1999 Letter at 1.

[125] New Skies's Opposition at 16; *see also* Articles of Association, Article 15.

[126] Comsat's Reply Comments at 19; BTNA's Opposition at 7; New Skies's Opposition at 17.

[127] Comsat's Reply Comments at 20; *see also* Assembly Decision at 9.

Skies.[128] Moreover, no member of New Skies's Management Board is currently employed or controlled by INTELSAT.[129] Therefore, we find that New Skies has separate officers, directors, and employees, consistent with our *DISCO II Order* and the Assembly Decision.

b. Transitional Agreements between New Skies and INTELSAT

48. In the course of creating a separate affiliate, the INTELSAT Assembly approved several draft service agreements to ensure the continuation of service while New Skies builds the necessary technical infrastructure to support the operation of the transferred satellites on its own.[130] Following the creation and incorporation of New Skies, INTELSAT and New Skies negotiated the final terms of the agreements.

49. *Transition Services Agreement*. The Transition Services Agreement embodies several agreements under which INTELSAT provides New Skies with information services support, financial and administrative support, service booking support, K-TV ground networking support, K-TV construction and launch support services, contract administration, certain customer support services, satellite management services, and various engineering services. The Transitional Services Agreement expires November 30, 1999.[131]

50. PanAmSat claims that the Transition Services Agreement enables INTELSAT to manage and operate New Skies's satellite system and provide technical/operational services free without an arm's-length contract.[132] According to PanAmSat, the relevant agreements do not specify a term, the required level of performance, or pricing for the services. According to PanAmSat, a failure to specify terms, performance measures, and pricing robs New Skies of its ability to terminate the agreement if INTELSAT fails to perform its obligations.[133]

51. New Skies responds by stating that the vast majority of the services provided under the Transition Services Agreement have expired and the balance will expire upon the in-orbit delivery of the K-TV satellite.[134] Specifically, New Skies states that the information systems

[128] New Skies's Annual Report at 7. New Skies's General Counsel and Vice President of Business Development are former PanAmSat employees.

[129] New Skies's Annual Report at 11.

[130] Assembly Decision at 14.

[131] Transition Services Agreement at ¶ 1(a).

[132] PanAmSat's Petition to Deny at 5.

[133] *Id.*

[134] May 27, 1999 Letter at 1. The K-TV Ground Network System contract expires upon in-orbit delivery (second quarter 1999).

support, financial and administrative systems support, booking services support, and all customer service contracts have expired.[135] Moreover, New Skies argues that those arrangements had not been open ended, as claimed by PanAmSat, but had been subject to limits on duration and defined cost methodologies.[136]

52. In addition, New Skies, Comsat and BTNA explain that the INTELSAT Board of Governors approved an INTELSAT management proposal that the price for the services would be negotiated using the methodologies and assumptions (including a cost plus 20 percent mechanism) incorporated in a December 1997 presentation to the INTELSAT working party.[137] According to New Skies, such cost plus pricing is a common commercial practice and ensures there will be no cross-subsidy from INTELSAT to New Skies.[138]

53. We recognize the need for INTELSAT to perform certain transitional services for New Skies in view of the fact that New Skies inherited five operational satellites with existing customers before it could hire employees and obtain workplace arrangements required to commence and develop operations.[139] Moreover, in the case of ICO Communications Ltd., we recognized that Inmarsat would provide various development and support services to ICO similar to those provided by INTELSAT to New Skies.[140] New Skies also informed the Commission that all but the K-TV Ground Network System contract have expired.[141] We, therefore, find that because all of the transitional services agreements have expired, or in the

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[135] *Id.*, Attachment B.

[136] New Skies's Opposition at 8.

[137] New Skies's Opposition at 8, note 12; Comsat's Reply Comments at 16; BTNA's Opposition at 4.

[138] New Skies's Opposition at 8, note 12.

[139] May 27, 1999 Letter, Attachment B.

[140] *Comsat Authority to Participate in ICO*, File No. 106-SAT-MiSC 95, FCC 99-21 (released Feb. 25, 1999). In the case of ICO, we determined that development and support services from Inmarsat for much longer duration and involving a broader range of functions was acceptable from an arm's-length standpoint because the contract was cost-based, reasonable, and provided adequate compensation for Inmarsat's fully distributed costs. Here, PanAmSat poses no credible evidence that INTELSAT's full cost recovery plus a 20% fee would not cover INTELSAT's fully distributed costs.

[141] New Skies states that the following transitional service agreements have expired: information systems support contract, financial and administrative systems contract, booking services contract, administration support contract, management of satellite operational plans contract, frequency plans and earth station data contracts, satellite and inventory management services contracts. The only remaining transitional services agreement is the KTV ground network system contract, which expires upon in-orbit delivery. May 27, 1999 Letter, Attachment B.

case of the KTV Ground Network System, is expected to expire shortly, these agreements do not create any potential for competitive harm.

54. *Space Segment and Satellite Communications Services Agreement.* These two agreements were negotiated between INTELSAT and New Skies to provide control services for the operation of the satellites.[142] The Space Segment Services Agreement involves the operation and control of the satellite bus and payload. This Agreement expires eighteen months from the date of the asset transfer, with two options to extend for six month period.[143] The Satellite Communications Services Agreement involves the operation, control, and monitoring of traffic on the satellite.[144] This agreement expires on November 30, 1999.

55. PanAmSat and Columbia claim that INTELSAT will manage and operate the New Skies's satellite system under the terms of these agreements.[145] PanAmSat contends that INTELSAT will perform virtually all technical functions relating to the management and operation of New Skies's satellite system, including carrier management and associated services.[146] According to PanAmSat, such services go beyond tracking, telemetry and control (TT&C). PanAmSat asserts that this will put INTELSAT in the middle of New Skies's day-to-day management by having INTELSAT develop link budgets for particular customer applications, assign carriers, and analyze and respond to issues of carrier performance.[147] Moreover, according to PanAmSat, such an agreement cedes to INTELSAT control over New Skies's long range system planning decisions.[148]

56. New Skies states that under the Space Segment Services Agreement, it will obtain certain technical services from INTELSAT that include TT&C functions (with outsourcing of TT&C being a common practice in the satellite field).[149] According to New Skies, these services will be provided pursuant to an arm's-length contract negotiated between New Skies and

[142] Space Segment and Satellite Communications Services at 1.

[143] May 27, 1999 Letter, Attachment B. New Skies states that it plans to take over these operations in June, 2000.

[144] *Id.*

[145] PanAmSat's Petition to Deny at 5; Columbia Letter at 2.

[146] *Id.*

[147] *Id.*; PanAmSat's Reply Comments at 4.

[148] PanAmSat's Petition to Deny at 5.

[149] New Skies's Opposition at 8.

INTELSAT.[150] New Skies also explains that this arrangement is not open-ended, but is subject to a limit on duration and a specific pricing term (cost plus 20 percent).[151] With regard to the Satellite Communications Services Agreement, New Skies states that it intends to take over operations within the twelve month term.[152]

57. We do not believe that the Space Segment Services contract poses potential competitive concerns. The Space Segment Service Contract only provides control services for the satellites, i.e. keeps the satellites in their proper place and altitude and changes the configuration of the communications payloads as requested by New Skies. This arrangement is similar to the contract between Columbia Communications Corporation and INTELSAT for the control of Columbia's 515 satellite.[153] The Satellite Communications Services Contract, however, encompasses both the activation of new carriers and the maintenance of existing carriers, and may give INTELSAT direct contact with New Skies customers.[154] We find that this agreement while necessary for transitional purposes, involves the type of contacts with INTELSAT that are not normally appropriate under an arm's-length relationship and may increase the potential for competitive harm. However, we find that ending the satellite communications services contracts at the early date anticipated by New Skies will eliminate competitive concerns regarding INTELSAT's access to New Skies customers.[155] We require New Skies, in its quarterly report to the Commission, to include information on its progress towards terminating the remaining agreements with INTELSAT (i.e., Satellite Communications Services Contract and the K-TV contracts).

58. *Ensured Capacity Rights (ECR) Agreement*. The ECR Agreement gives INTELSAT the right, over a 25 year period, to obtain under certain circumstances, New Skies capacity for a fixed fee. The ECR Agreement addresses INTELSAT's concern over its ability to provide, on a commercial basis, the space segment required for international telecommunications services on

[150] *Id.* at 8-9.

[151] *Id.*

[152] May 27 Letter at Attachment B. New Skies explains that its contract permits one option to extend the term of the contract for an additional six-month period, but it intends on taking over the Satellite Communications Services by December 1999 and not exercising that option.

[153] *In the Matter of Columbia Communications Corp*., Memorandum Opinion, Order and Authorization, 13 FCC Rcd 17772 (Sept. 8, 1998).

[154] Space Segment and Satellite Communications Services at ¶ 3.3.

[155] New Skies also informs the Commission that its Network Operations Center is now under construction in the Hague and New Skies intends to assume responsibility for payload management by December 1999. In addition, the K-TV satellite support services will terminate upon the launch of that satellite (expected later this year). June 22, 1999 Letter at 2.

a non-discriminatory basis to all areas of the world.[156] Indeed, the United States participated in the negotiation leading to the ECR Agreement and ultimately agreed to ensure that members of the developing world have access to space segment capacity, if needed. The ECR Agreement mandates that New Skies submit a bid for the provision of ECR capacity to be carried out by INTELSAT.[157] New Skies is obligated to submit a bid if New Skies possesses spare space segment capacity. New Skies also is required to market, sell, or lease, as an agent for INTELSAT, excess capacity beyond the ECR capacity.[158]

59. PanAmSat argues that the ECR Agreement gives INTELSAT special rights to obtain New Skies capacity at fixed rates for a 25-year term.[159] PanAmSat further argues that given the nature of the satellite business, particularly the boom and bust cycles that occur as shortages of capacity turn into gluts and back to shortages, the ability to secure capacity at fixed prices is an extraordinary right.[160] New Skies responds that several Signatories insisted on providing INTELSAT with the ability, in very limited circumstances, to obtain capacity from New Skies to support lifeline services in INTELSAT's role as "carrier of last resort."[161] In addition, New Skies adds that the circumstances under which these rights might be exercised are limited.[162] New Skies also asserts that the agreement specifies a "cost plus" basis for determining the charges New Skies will assess for the ECR capacity, ensuring that no-cross subsidy from New Skies to INTELSAT occurs.[163] Conversely, INTELSAT is not obligated to accept the New Skies ECR proposal should alternative capacity be available at a lower cost to INTELSAT, thus ensuring that no cross-subsidy is created by the cost plus formula included in the agreement.[164]

60. Comsat further explains that the ensured capacity rights mechanism was an essential

[156] ECR Agreement at Article 4.

[157] *Id.* at Article 5.

[158] *Id.* at Article 6.

[159] PanAmSat's Petition to Deny at 8.

[160] *Id.*

[161] New Skies's Reply at 13.

[162] For example, INTELSAT must submit to New Skies an "initiating notice" three years in advance of the date it wants to use the capacity. In addition, the capacity is only available if New Skies possesses the space segment. New Skies is not obligated to take any steps to cancel or fail to renew existing contractual relationships with its customers. ECR Agreement at ¶ 5.1.

[163] New Skies's Reply at 14.

[164] *Id.*

element of the transfer of the six INTELSAT satellites. This provision, according to Comsat, is designed to reassure the developing world that the spin-off would not place in jeopardy INTELSAT's obligation to provide universal service.[165] Moreover, Comsat points out that the United States actively participated in these discussions and did not object to the inclusion of the ECR Agreement in the overall restructuring package.[166] Finally, Comsat argues that the ECR Agreement does not raise any possibility of cross-subsidization from INTELSAT to New Skies. The benefit, if one exists, actually goes to INTELSAT, according to Comsat.[167]

61. Overall, we conclude that the ECR Agreement does not create competitive concerns and, moreover, that it may provide an important benefit to some entities in the developing world. The ECR Agreement concerns the equivalent of only one transponder on a satellite that typically carries 24 to 36 transponders.[168] Thus, the potential competitive harm of any agreement involving such a small fraction of satellite capacity would be insignificant. Moreover, the ECR Agreement would appear to be more of a commercial burden rather than an unfair competitive benefit to New Skies since INTELSAT obtains the use of the transponder capacity at a fixed rate. In addition, we recognize the importance of such an agreement to INTELSAT members from the developing world. Given the importance of this agreement to the developing world and the context in which it was negotiated, we believe that the benefits of this agreement outweigh any potential for competitive harm.

c. Assignment of Customer Contracts/Leaseback Arrangements

62. The five operational satellites transferred from INTELSAT to New Skies were serving customers under existing contracts when the transfer occurred. In addition, there were commitments to customers in the form of guaranteed reservations and first refusal reservations for capacity on the satellites to be transferred to New Skies. The Assembly Decision endorsed the principle of contract novation[169] as a basis for transferring customer commitments to New Skies and that principle is reflected in New Skies's Subscription Agreement.[170] The Assembly Decision recognized, however, that it may not be possible for national regulatory authorities to complete, prior to the transfer, the process of obtaining landing rights approvals to permit

165 Comsat's Reply Comments at 19.

166 *Id.*

167 *Id.*

168 ECR Agreement at Article 2.2.

169 Novation is the substitution of a new obligation or contract for an old one by mutual agreement of all parties concerned.

170 Assembly Decision at 13; New Skies's Subscription Agreement at ¶ 14.1.

service continuity for services on the satellites transferred to New Skies.[171] Therefore, as temporary measures, the Assembly endorsed and the Board of Governors subsequently approved assignment of contracts and leaseback arrangements as a means to assure service continuity following transfer of the satellites.[172]

63. Leaseback arrangements are governed by the Transponder Leasing Agreement between INTELSAT and New Skies that establishes the terms by which INTELSAT leases capacity from New Skies for use by Signatories. A number of the customer contracts are subject to a leaseback mechanism so that INTELSAT can continue to provide a pre-existing service to the customer. New Skies is denied a relationship with the customer in the Leaseback arrangements. Instead, the customer continues a direct relationship with INTELSAT. Novation of the INTELSAT contracts, on the other hand, requires each customer to renegotiate the terms of each contract with New Skies and enter into new contractual commitments with New Skies. This option is ideal because it ensures that New Skies has the direct relationship with its customers as the Assembly intended. New Skies, thus far, has not been able to novate successfully any of the customer contracts associated with the five satellites transferred from INTELSAT to New Skies.[173]

64. Assignment of the contracts means that INTELSAT "assigns" its contractual commitments and delegates its contractual duties to New Skies. Assigning the customer contract obligates New Skies to perform INTELSAT's contractual commitments using portions of the space segment transferred from INTELSAT to New Skies. However, if New Skies is not able to perform its obligations, INTELSAT remains responsible for the performance of the customer contracts. The majority of the customer contracts were assigned to New Skies by INTELSAT, including Comsat's contracts with INTELSAT to provide service in the U.S. market.[174]

65. PanAmSat claims that the strongest evidence of INTELSAT's role as the *de facto* operator of New Skies's system is the overall contract approach of "assigning INTELSAT customer contracts to New Skies."[175] PanAmSat argues that the assignment of customer contracts has

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171 Assembly Decision at 12.

172 The United States made it clear at the Assembly that it would not employ the "leaseback" approach to assuring continuity of service between New Skies and U.S. companies. The leaseback approach is an artificial arrangement that, as discussed below, inhibits New Skies's independence from INTELSAT. And, it is unnecessary in the United States to assure continuity of service. We assured continuity of service through special temporary authorizations which, unlike countries employing "leaseback," gave New Skies immediate entry into the U.S. market, in its own name, pending review of the earth station applications.

173 New Skies's Annual Report at 9.

174 *Id.*

175 PanAmSat's Petition to Deny at 7.

been designed so that, in effect, nothing changes between INTELSAT and its Signatories as to the contracts being assigned.[176] PanAmSat also contends that the Signatories will still receive INTELSAT ownership share credit for their use of New Skies's satellite capacity and, absent INTELSAT's consent, payments will be made to INTELSAT and then remitted to New Skies.[177] PanAmSat also asserts that New Skies may not shift a Signatory customer to another satellite unless INTELSAT gives its consent.[178] Furthermore, PanAmSat notes that assignment of its Signatories customer contracts to New Skies makes INTELSAT a guarantor of New Skies's capacity.[179] PanAmSat claims that back-up protection will be provided irrespective of whether the customer's existing agreement calls for any such protection. PanAmSat argues that INTELSAT will provide back-up capacity without charge to New Skies.[180]

66. New Skies argues that the Assembly Decision provides for both assignment, leaseback and novation of INTELSAT's contractual obligations to its customers in order to ensure continuity of service.[181] Moreover, New Skies contends that it has replaced INTELSAT in its direct operational relationship with the customers and that New Skies will assume full responsibility for billing and collection for services it provides under the assigned contracts.[182] New Skies also argues that it will have complete authority to shift the Signatory customers to another New Skies satellite without INTELSAT's consent.[183] New Skies asserts that in accordance with normal commercial practice, New Skies has the right to enforce the assigned contracts and the responsibility for asserting any claim against customers under the assigned contracts, and bears related expenses.[184] Finally, New Skies contends that INTELSAT is not acting as a guarantor of New Skies capacity.[185] Instead, according to New Skies, INTELSAT created an exception in one instance, whereby it would retain responsibility (through a leaseback arrangement) for the provision of lifeline public switched network requirements in

[176] *Id.* at 8.

[177] PanAmSat's Petition to Deny at 7.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 6.

[181] New Skies's Opposition at 11; *see also* Assembly Decision at 13.

[182] New Skies's Opposition at 10.

[183] *Id.* at 12-13; *see also* Subscription Agreement at ¶ 3.1

[184] New Skies's Opposition at 13.

[185] *Id.* at 10.

Portugal.[186]

67. During the negotiations leading to the creation of New Skies, novation of Signatory contracts and termination of leaseback arrangements proved to be major hurdles to the creation of New Skies because INTELSAT's Signatories receive ownership share credit for their use of INTELSAT's satellites.[187] The Assembly decided that if the customer contracts were "assigned" to New Skies, usage on the transferred satellites could be recognized for INTELSAT investment share calculations. Thus, if Signatories novate their respective customer contracts, they lose INTELSAT ownership share credit; if INTELSAT assigns the customer contracts to New Skies, the Signatories continue to receive INTELSAT ownership share credit for using the satellites, despite the fact that the satellites are owned by New Skies.[188]

68. We understand New Skies cannot unilaterally novate the existing assigned contracts, nor the existing leaseback contracts.[189] However, nothing more clearly demonstrates that New Skies is not yet fully independent of INTELSAT than its inherited customer base. Moreover, the Signatories' continued reliance on assignment and leaseback arrangements (with the exception of certain leasebacks intended to assure lifeline services) originally established only as interim measures to assure continuity of service, will reduce New Skies's effectiveness as a new competitor. The fact that these artificial arrangements continue apparently for the benefit of the Signatories makes it more difficult for New Skies to operate independently of INTELSAT interests.[190] Moreover, unless the apparent impediments to the novation process are removed, we recognize that New Skies's ability to establish a credible, commercial track record necessary for it to undertake an IPO in the near future would be adversely affected.[191] Therefore, we find,

[186] Assembly Decision at 10. This is with respect to a single lease for four transponders on one satellite (338.5° E.L.).

[187] Article 6(b) of the INTELSAT Operating Agreement measure utilization percentages for investment share purposes on the basis of "space segment utilization charges payable by the Signatory to INTELSAT." Thus, ownership share credit determines the amount each Signatory owns of INTELSAT

[188] *Id.*

[189] New Skies states that its representatives consistently raise the issue of novation of existing agreements with current customers. However, New Skies has not been able to novate a single customer contract to date. New Skies explains that in discussions with customers regarding novation, the principal impediment to novation is the fact that existing customers will lose an investment share with INTELSAT once the agreements are novated. May 27 Letter at 2.

[190] Approximately 25% of the those customer contracts that expired during the past six months were not renewed by customers, notwithstanding New Skies's best efforts to secure renewals. In a number of instances, customers that declined to renew with New Skies migrated their services to New Skies's competitors, including INTELSAT. June 16, 1999 Letter at 2.

[191] INTELSAT's Board of Governors recently considered but declined to take action to remove these

consistent with the intent of the Assembly Decision and under the terms of New Skies's Subscription Agreement with INTELSAT, that New Skies must continue to use its best efforts to novate the assigned and leaseback contracts in order to demonstrate its independence from INTELSAT. Because an inherited customer base provides New Skies an advantage over its competitors and clearly demonstrates a lack of an arm's-length relationship between New Skies and INTELSAT, we require New Skies to report, on a quarterly basis, its progress towards novating these contracts.

4. Conclusions Regarding New Skies's Relationship with INTELSAT

69. We find that New Skies has not yet achieved independence from INTELSAT because: (1) New Skies has yet to conduct an IPO to achieve "substantial" non-Signatory ownership; (2) New Skies's customer contracts have yet to be novated as anticipated by the Assembly Decision; and, (3) New Skies has yet to terminate the remaining service agreements (such as the K-TV agreements and the satellite communications services contract). Until New Skies takes these steps to achieve independence from INTELSAT, there remains a potential for harm to competition in the U.S. market and the benefits that would result from a new, independent competitor will not be fully realized. Based on the record overall and the balance of public interest factors under the *DISCO II Order*, we conclude that a three-year license term for earth station operators communicating with the New Skies satellites is more appropriate at this time. This approach is necessary because of the serious competition concerns resulting from New Skies's current position as an affiliate of INTELSAT not yet independent of INTELSAT. Specifically, because of its continued ownership by INTELSAT and its Signatories, New Skies's relationship vis-a-vis INTELSAT is largely unchanged since it was created by the INTELSAT Assembly in March 1998.

70. The three-year license term will give us a full opportunity to monitor New Skies efforts to become independent of INTELSAT, while creating a suitable incentive for the company to conduct an IPO creating substantial non-Signatory ownership. A limited, three-year license term is consistent with the Assembly Decision, the IGO affiliate standard adopted in the *DISCO II Order*, and the Commission's rules.[192] This approach will give New Skies the incentive and provide us a full opportunity to monitor New Skies's efforts to become independent of INTELSAT. The Commission will consider the appropriate action to extend the three-year earth

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impediments.

[192] The Commission has granted licenses for less than full terms on occasion to U.S. licensees. *See generally In re Application of Volunteers in Technical Assistance,* Order, 12 FCC Rcd 3094 (1997); *In re Application of Volunteers in Technical Assistance,* Order and Authorization, 11 FCC Rcd 1358 (1995); *In the Matter of GTE Spacenet Corporation,* Memorandum Opinion, Order and Authorization, 2 FCC Rcd 5312 (1987); *In re Application of Hye Crest Management, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 332 (1991); *In re Petition of United States Satellite Broadcasting Company, Inc.*, Memorandum, Opinion and Order, 1 FCC Rcd 977 (1986).

station licenses granted today to a normal, full "ten-year" license term, if New Skies demonstrates on the record that it has achieved independence from INTELSAT. New Skies may seek to do so at anytime during the term of the licenses.

71. In order for the Commission to evaluate such a request, New Skies should submit information regarding progress toward and results of: (1) a substantial IPO and any additional plans to increase non-Signatory ownership; (2) termination of the remaining service agreements (with the exception of TT&C); and (3) novation of contracts and termination of leaseback arrangements. The Commission will place this information on public notice and seek to act on any such request in a timely manner.

72. To encourage speedy achievement of independence from INTELSAT and to carry on the ex post review process established by the INTELSAT Assembly, during the term of three-year license, New Skies must file quarterly (based on a calendar quarter) with the Commission a status report on its plans for its IPO and associated dilution of INTELSAT's Signatories's ownership as well as progress on novation of customer contracts and termination of existing service agreements. Such reports shall include information on: (1) selection of an investment bank/underwriter; (2) filing of the registration statement with the Securities and Exchange Commission; (3) completion of financial analysis and due diligence; (4) a copy of the Preliminary Prospectus and the Final Prospectus (when made available to the general public); (5) information on novation of its customer contracts; and, (6) information on termination of service agreements between New Skies and INTELSAT.

73. Finally, this Order modifies existing earth station licenses and grants pending applications by earth station entities to provide domestic and international FSS services in the United States via the New Skies satellites. Accordingly, we modify the existing earth station licenses, previously authorized for a full ten-year license term, to reflect the three-year license term granted today. The three-year license term pertains to that portion of the earth station authorization applicable to the New Skies satellites. Applications for new earth station facilities are granted for a three-year license term, unless otherwise extended by the Commission.[193] All of the earth station licenses granted today will expire on August 6, 2002 and any earth station licenses subsequently granted for communications via New Skies's satellites, prior to August 6, 2002, also will expire on August 6, 2002.

D. Other Public Interest Considerations

1. Prohibition Against Exclusive Arrangements

[193] 47 U.S.C. § 309. The Commission rules reserve the right to grant licenses for less than ten-years, if, in its judgment, the public interest, convenience, and necessity will be served by such action. *See also* 47 C.F.R. § 25.121.

74. Exclusive arrangements generally take the form of an agreement between a space station operator or service provider that offers a particular satellite system as the only permissible facility through which to obtain a particular satellite service between the United States and another country. Prohibiting these types of arrangements is intended to facilitate competition by encouraging the use of multiple satellite systems in other countries and to ensure that all parties have an opportunity to provide truly global service, which also would facilitate competition in the U.S. market. In the *DISCO II Order*, the Commission stated it would apply all requirements imposed on U.S. satellite systems to non-U.S. systems as well, including the prohibition on exclusionary arrangements.[194] Thus, if a provider (U.S. or non-U.S.) has an exclusive arrangement, we will not authorize service by the provider between the U.S. and the country with which the provider has such an exclusive arrangement.[195] We apply this requirement to New Skies.

2. Technical Considerations

75. One of the cornerstones of the Commission's satellite licensing policies is two-degree orbital spacing between geostationary satellites. This policy permits the maximum use of the geostationary orbit. Applicants must demonstrate that they comply with the Commission's technical requirements designed to permit two-degree spacing before they are authorized to provide service in the United States. We license non-compliant satellites as well as earth stations only when the applicants can demonstrate that their operations cause no harmful interference to existing satellite operations.[196] Further, we condition any non-conforming operations upon a licensee accommodating future satellite networks serving the United States that are two-degree compliant.[197] The New Skies satellites do not meet the Commission's two-degree-spacing requirements. Consistent with our treatment of U.S. licensed systems, we permit New Skies to provide service in the United States, on a non-interference basis to two-degree compliant operations.

76. Specifically, none of New Skies's satellites meets the polarization requirements of the Commission's rules for the 4/6 GHz frequency band.[198] In addition, the New Skies's satellites

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[194] *DISCO II Order*, 12 FCC Rcd 24094, 24102.

[195] As stated in the *DISCO II Order*, we recognize that certain countries may not yet have mechanisms in place by which to authorize competitive systems. In these cases, consistent with the *DISCO II Order,* we will allow non-U.S. licensed systems to access the U.S. market but will prohibit service between the U.S. and the country with which it has the exclusive arrangement.

[196] *See, e.g.,* Section 25.209(f) of the Commission's rules, 47 C.F.R. § 25.209(f).

[197] *See Licensing of Space Station in Domestic Fixed-Satellite Service*, 48 Fed. Reg. 40233 (Sept. 6, 1983) at ¶ 101.

[198] Section 25.210(a)(1) and (3) of the Commission's rules, 47 C.F.R. § 25.210(a)(1) and (3), requires

typically do not meet the FM/TV frequency plan requirement of the Commission's rules.[199] Also, except for INTELSAT-K, none of the New Skies satellites will operate on permitted tracking, telemetry and telecommand frequencies.[200] Further, the INTELSAT-513 at 183° E.L. does not meet the requirements concerning saturation flux density,[201] stationkeeping[202] and polarization isolation in the 4/6 GHz frequency band.[203]

77. These technical requirements facilitate coordination of satellite networks and if they are not met, it will be difficult to coordinate the New Skies satellites with satellites serving the U.S. that are two-degree compliant. However, there are, at present, no U.S. or foreign licensed satellites serving the United States in the vicinity of the New Skies satellites that have not been already coordinated with the New Skies satellites prior to their transfer. As a result, the New Skies satellites are not expected to cause harmful interference to any U.S. or foreign licensed satellite serving the United States at this time. For these reasons, we waive, on our own motion, the technical requirements described above in order to permit New Skies to continue service to

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satellites in the FSS used to provide domestic service to use linear orthogonal polarization with the capability of switching sense of polarization by ground command. The Domestic/International Satellite Consolidation Order removed the distinction between domestic and international service when applying the requirements of Part 25 of the Commission's rules. All the New Skies satellites use circular polarization in the 4/6 GHz frequency band with no switching capability.

199 Section 25.211(a) of the Commission's rules, 47 C.F.R. § 25.211(a), requires analog video transmissions in the band 3,700-4,200 MHz to transmit on center frequencies of 3,700+20N where N is an integer from 1 to 24.

200 Section 25.202(g) of the Commission's rules, 47 C.F.R. § 25.202(g), requires the tracking , telemetry and telecommand functions to operate at the edges of the allocated bands. The INTELSAT satellites which New Skies acquired typically perform these functions at the center of the 4/6 GHz frequency band.

201 Section 25.210(c) of the Commission's rules, 47 C.F.R. § 25.210(c), requires that the saturation flux density to be switchable in steps no greater than 4 dB over a range of at least 12 dB. The INTELSAT-513 has a minimum step of 5 dB in the 11/12/14 GHz bands and 7.5 dB in the 4/6 GHz band.

202 Section 25.210(j)(1) of the Commission's rules, 47 C.F.R. § 25.210(j)(1), requires that space stations operating in the GSO be designed with the capability to maintain their orbital longitude within 0.05° of their assigned location. The INTELSAT-513 was designed to maintain its longitude within 0.1° of its assigned location.

203 Section 25.210(i) of the Commission's rules, 47 C.F.R. § 25.210 (i), requires that space stations antennas be designed to provide a cross-polarization isolation such that the ratio of on-axis co-polar gain to cross-polar gain is 30 dB. The 4/6 GHz antennas on the INTELSAT-513 were designed to provide 27 dB of isolation.

its U.S. customers and we condition the earth station authorizations to this end.

78. In the future, should the Commission authorize access to the U.S. market by a satellite that is two-degree-spacing compliant, and is located as close as two-degrees from a New Skies satellite, New Skies would be expected to coordinate, in good faith, with the licensee of this satellite. If a coordination agreement is not reached, New Skies's operation must be on a non-interference basis relative to U.S. services being provided by the compliant satellite.

79. We will not permit New Skies's satellite network operations to interfere with U.S. services being provided by any authorized system that is two-degree spacing compliant, nor can New Skies claim protection against interference to its operations caused by U.S. services being provided by the two-degree compliant satellites.

IV. CONCLUSION

80. We conclude based on the record before us that New Skies entry into the U.S. market would not pose a high risk to competition that could not be cured with conditions, and that, therefore, New Skies, pursuant to *DISCO II*, should be permitted entry into the U.S. market. We find, however, that New Skies has not achieved independence from INTELSAT, as anticipated by the Assembly Decision. New Skies's lack of independence from INTELSAT could give New Skies a market access advantage over its competitors as a result of its continuing relationship with an IGO and its members. For this reason and the reasons discussed above, we grant three-year licenses to U.S. earth stations operating with New Skies.

81. We conclude that this approach is in the public interest because it allows the benefits of New Skies's entry into the U.S. market while at the same time addresses the competitive concerns at hand. Our action today is consistent with and implements U.S. obligations contained in the schedule of commitments under the WTO Basic Telecom Agreement which is part of the GATS, and the *DISCO II Order* implementing those commitments domestically. We believe that authorizing entry will provide sufficient flexibility and certainty, for New Skies to move forward with an IPO at a time conducive to market conditions. Finally, entry into the U.S. market will enable New Skies to ensure continuity of services and develop new service options and customer relations different from the Signatory customers assigned to it upon transfer of the satellites from INTELSAT.

V. ORDERING CLAUSES

82. Accordingly, IT IS ORDERED, that, pursuant to Sections 303(r), 308, 309, and 310, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(r), 308, 309, and 310 pursuant to Sections 25.121(a), 25.137(c) of the Commission's Rules, 47 C.F.R. §§ 25.121(a), 25.137(c), the earth station applications listed in Attachment A, ARE GRANTED for a limited three-year term, until August 6, 2002, to provide Fixed Satellite Services (FSS), excluding FSS Direct-To-Home services, to, from or within the United States by accessing the New Skies 513, New Skies 703, New Skies 803, New Skies 806, and New Skies K satellites;

83. IT IS FURTHER ORDERED that the Petition to Dismiss, Deny, or Defer filed by PanAmSat Corporation IS DENIED;

84. IT IS FURTHER ORDERED that all of the earth station licenses granted in this Order will expire on August 6, 2002 and any earth station licenses subsequently granted for communications via New Skies's satellites, prior to August 6, 2002, also will expire on August 6, 2002, unless otherwise extended by the Commission;

85. IT IS FURTHER ORDERED that this authorization does not authorize New Skies to provide any Direct-to Home (DTH) service, Direct Broadcasting Satellite (DBS) service, or Digital Audio Radio Service (DARS) to, from, or within the United States;

86. IT IS FURTHER ORDERED that at anytime during the three-year license term, New Skies may make a showing, on the record, that it has achieved independence from INTELSAT and, upon a sufficient showing, the Commission will consider the appropriate action to extend the earth station licenses to a full ten-year term;

87. IT IS FURTHER ORDERED that New Skies file quarterly reports with the Commission regarding the status of: (1) its IPO and associated dilution of INTELSAT's Signatories ownership; (2) information on New Skies's progress towards novating customer contracts; and, (3) information on New Skies's progress towards terminating remaining service agreements between INTELSAT and New Skies. These reports shall include specific information on the IPO such as: (1) selection of an investment bank/underwriter; (2) filing of the registration statement with the Securities and Exchange Commission; (3) completion of financial analysis and due diligence; (4) a copy of the Preliminary Prospectus and the Final Prospectus (when made available to the general public); and (5) information on novation of its customer contracts;

88. IT IS FURTHER ORDERED that the Commission waives Sections 25.210(a)(1) and (3), 25.211(a), 25.202(g), 25.210(c), 25.210(j)(1), 25.210(i) of the Commission's rules, 47 C.F.R. §§ 25.210(a)(1), 25.211(a), 25.202(g), 25.210(c), 25.210(j)(1), 25.210(i), to ensure that the space stations may provide service to the U.S. market;

89. IT IS FURTHER ORDERED that access to New Skies satellite networks shall be in compliance with the satellite coordination agreements reached between the United States and INTELSAT regarding the operations of New Skies 513, New Skies 703, New Skies 803, New Skies 806 and New Skies K;

90. IT IS FURTHER ORDERED that consistent with the satellite coordination agreements reached between the United States and INTELSAT regarding the operations of New Skies 806, the Ku-band frequencies on New Skies 806 have not been coordinated for operation over North America. Ku-band operations over the New Skies 806 satellite in the United States may not cause interference to, and may not claim protection from, (1) any U.S.-licensed geostationary satellite network and (2) non-U.S.-licensed geostationary satellite networks operating in

conformance with international coordination agreements;

91. IT IS FURTHER ORDERED that operations over the New Skies 513, New Skies 703, New Skies 803, New Skies 806 and New Skies K satellite networks shall not cause harmful interference to, nor shall operators accessing these satellite networks claim protection from, U.S. services provided by U.S. authorized satellite networks that are compliant with the Commission's two-degree spacing rules;

92. IT IS FURTHER ORDERED that operations over the New Skies 513, New Skies 703, New Skies 803, New Skies 806, and New Skies K satellite networks shall not cause harmful interference to, nor shall operators accessing these satellite networks claim protection from, United Sates-authorized services that are compliant with the Commission's two-degree spacing rules and provided over non-United States authorized satellite networks;

93. IT IS FURTHER ORDERED that operations over and access to the New Skies 513, New Skies 703, New Skies 803, New Skies 806, and New Skies K satellite networks shall cease immediately upon notification of harmful interference. Complaints of all radio interference shall be forwarded immediately to the Commission in writing;

94. IT IS FURTHER ORDERED that this authorization is effective upon adoption. Petitions for Reconsideration, pursuant to Section 1.106 of the Commission's Rules, may be filed within 30 days of the public notice of this Order. 47 C.F.R. § 1.106. This grant is also subject to Section 1.110 of the Commission's Rules. 47 C.F.R. § 1.110.

Federal Communications Commission

Magalie Roman Salas
Secretary